would be in conflict with the whole of his previous statement, the sub-section is usually invoked for the purpose of focussing attention on particular discrepancies. It is not immediately obvious why it should be necessary to provide the defence with anything more than a copy of the relevant passage in the statement which corresponds to the particular piece of evidence which they wish to attack, but it may be that the legislature feared that there might be some risk in limiting the right of the defence to receiving a copy of isolated passages taken out of context. At all events, they have used words which make it clear that the defence is entitled, if the Court thinks it expedient in the interests of justice that they should see any part of the statement, to be furnished with a copy of the whole statement. It follows that the furnishing of copies of extracts only from the statements of P.W. 1 and D.W. 3 was wrong. In our view, however, it could not have occasioned any possible miscarriage of justice in the present case and we would accordingly apply the proviso to section 29(1) of the Courts Ordinance, 1948.

The four original grounds of appeal against conviction were not strongly pressed by Mr. Marshall and we can find nothing in them which would cause us to interfere with the result of the trial. We do not propose to comment on grounds (3) and (4) but will deal shortly with grounds (1) and (2).

It was a somewhat unusual feature of this case that Letchimi and Kalanjiam, who on either version of the incident would appear to have been material witnesses, were not called by the prosecution. They were present and their presence was announced by the Deputy Public Prosecutor at the close of the prosecution so that the defence could have called them if they wished. The defence, of course, would have much preferred them to be offered for cross-examination but in our opinion the prosecution were under no duty to take this course and it was sufficient that they made known to the defence the availability of these witnesses if they required them. This seems to us to be well settled law. We do not think it necessary to resort to extensive quotation from the many authorities which were discussed by this Court in the case of *Khoon Chye Hin* v. *Public Prosecutor* [1]. It is clear from these authorities that the prosecutor has a discretion and also that if he does not call material witnesses who are available he runs the risk of having the presumption in illustration (g) to section 114 of the Evidence Ordinance raised against him. In the present case there was no attempt at concealment, no suggestion, as was said by Lord Thankerton in the case of *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* [2], "that the prosecutor has been influenced by some oblique motive". The witnesses were freely offered to the defence and in our opinion the presumption did not arise. In our view the direction given by the trial judge on this point at page 94 of the record where he referred to the case of *Khoon Chye Hin* was adequate and unexceptionable.

The second of the original grounds of appeal is that the learned trial judge erred in law in not directing the jury on certain evidence given by P.W. 1 of conversations between himself and Letchimi and Kalanjiam which the trial judge, in the absence of the jury, had described as hearsay. Of course, if it was hearsay and if the judge thought it was hearsay he ought to have taken steps to expunge it from the minds of the jury. In our opinion, however, it was not hearsay at all, and was relevant, and it may be that the judge revised his earlier opinion before he came to sum up.

For these reasons we dismiss the appeal against the conviction.

In all the circumstances we are unable to say that a sentence of seven years' imprisonment is excessive and we dismiss the appeal against sentence also.

Appeal dismissed.

Solicitors: *David Marshall.*

FRANCIS v. MUNICIPAL COUNCILLORS OF KUALA LUMPUR

[P.C. (Lord Evershed, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva) October 3, 1962]

[Privy Council Appeal No. 8 of 1961]

Master and Servant — Wrongful dismissal — Right to declaration that servant was still employed — Municipal Ordinance, (S.S. Cap. 133), s.16.

The appellant entered the employment of the respondent Council in 1950 and in 1953 he was taken on to their permanent staff. By virtue of section 16 of the Municipal Ordinance the powers of appointment to and removal from office were vested in the President subject to the proviso that approval by the councillors was required. On October 1, 1957 the appellant was dismissed. The appellant then commenced the present proceedings. At the trial Ong J. dismissed his claim. On appeal the Court of Appeal in allowing the appeal awarded him damages amounting to three months' salary. The appellant in this appeal sought a declaration that the purported dismissal was *ultra vires* or null and void and that he continued to be and still continues to be employed by the respondents. There was also an alternative claim for damages for wrongful dismissal.

Held: where there had been a purported termination of a contract of service a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances, because of the principle that the courts would not grant specific performance of contracts of service. In this case as there were no special circumstances, the appellant's remedy lay in damages for wrongful dismissal.

Vine v. *National Dock Labour Board* [1] distinguished.

Case referred to:—

(1) *Vine* v. *National Dock Labour Board* [1956] 1 Q.B. 658, C.A.; [1957] A.C. 488; [1956] 3 All E.R. 939, H.L.

PRIVY COUNCIL APPEAL.

Dingle Foot, Q.C. (*T. O. Kellock* and *D. Taverne* with him) for the appellant.

J. T. Molony, Q.C. (*F. M. Drake* with him) for the respondents.

Lord Morris of Borth-y-Gest: This appeal is from a judgment and order, dated the 30th May, 1960, of the Court of Appeal of the Supreme Court of the Federation of Malaya. That Court by a majority (Hill and Good JJ.A., Thomson C.J. dissenting) allowed the appeal of the appellant from the decision (dated the 14th December, 1959) of the trial Judge (Ong J.). The trial Judge had dismissed the claim which the appellant, as plaintiff, had brought. The Court of Appeal in allowing his appeal awarded him damages for wrongful dismissal. By way of damages they awarded him an amount equal to three months' salary. The appellant now seeks further and different relief. He contends that his purported dismissal was *ultra vires* and that consequently he had continued to be and still continues to be employed by the respondents and was entitled to a declaration to that effect.

The main facts which give rise to the litigation can be briefly recorded. On the 1st July, 1950 the appellant joined the staff of the Municipal Council of Kuala Lumpur. He joined on a temporary basis at a salary of $108 a month and was a clerk in the department of the Town Superintendent. On the 1st June, 1953 he was placed on the permanent staff of the Council at a salary of $126 a month. By July, 1957 his salary had been increased to $276 a month. It was the practice of the Council to allow their employees, subject to certain restrictions, to cash their personal cheques at the Municipal Treasury. On the 19th June, 1957 the appellant cashed two cheques each for $300 and on the 20th June, 1957 he cashed a cheque for $500. The two $300 cheques were not met on presentation. On the 21st June the Municipal Treasurer sent a letter of complaint to the appellant: the letter asserted, in fact wrongly, that the $500 cheque as well as the two other cheques had not been met. On the 22nd June the appellant paid the Treasurer $600 in cash in respect of the two cheques. The incident of the cheques was reported to the President of the Council. On the 25th June the Town Superintendent sent a letter to the appellant stating that he was directed by the President to suspend the appellant from duty. On the 27th June the appellant wrote to the Municipal Treasurer and explained the circumstances that had brought about the result that his two cheques (each for $300) had not been met. The Establishment Committee of the respondents set up a Sub-Committee "to enquire into the misconduct" of the appellant. That Sub-Committee recommended that the appellant's suspension should cease and that he should be re-instated but, having had suggestions that as an employee he was not satisfactory they advised that a further departmental enquiry should be held to consider his usefulness to the Council in the continuance of his duties. Thereafter at a meeting of the Establishment Committee. at which the President of the Council was present..and which was held on the 18th September. it was decided (with one dissentient) that in view of adverse reports on the appellant's work his service should be terminated from the 30th September. An ordinary meeting of the Council was held on the 30th September and on the following day (1st October, 1957) a letter, signed by the acting Municipal Treasurer, was sent to the appellant informing him that the Establishment Committee had decided to terminate his services with effect from the 30th September on the grounds of adverse reports against his work and conduct and that the Committee's decision had been confirmed by the full Council meeting held on the 30th September.

Kuala Lumpur has been constituted a Municipality and provided with a Town Council under section 6 of the Municipal Ordinance of the former Straits Settlements, Cap. 133, as applied to the former Malay States including Selangor by the Municipal Ordinance (Extended Application) Ordinance, 1948, and as subsequently amended by Federal Law. There was a provision pursuant to which the President was required to submit to the Council for its approval a list of the offices which he considered to be necessary for the purpose of the Ordinance. That list needed the approval of the Council and there was a measure of overriding control by the State Government.

Section 16(5) of the Ordinance, as amended, is in the following terms:—

> "The President may appoint such persons as he thinks fit to the offices shown on the list so approved as aforesaid and may remove such persons from office and appoint others in their stead, provided that the appointment and removal of persons to or from an office carrying a commencing salary of two hundred dollars a month and over shall be subject to the approval of the Councillors."

The appointment of the appellant was to an office which was on the list referred to in the provisions of this section.

On the 14th October the appellant's solicitor sent a letter of protest to the Council. The letter contained detailed criticisms of the steps that had been taken and claimed that the termination of service was bad in law and stated that, unless there was re-instatement forthwith, proceedings would be taken in the High Court for wrongful dismissal and for other relief. The President of the Council replied by a letter of the 28th October in which he stated that the removal of the appellant from his office with effect from the 30th September was in accordance with his decision "in addition to the decision of the Establishment Committee and of the Municipal Council whose concurrence was in fact unnecessary at law". The President further stated that municipal officers in the category which included the appellant were appointed and removed by him at pleasure and that as the termination of the appellant's service was not bad in law there could be no question of his re-instatement. On the same day (28th October) the President addressed a letter to the appellant in which, after referring to the letter of the 1st October from the acting Municipal Treasurer, he informed the appellant that he confirmed the appellant's removal from office with effect from the 30th September and that he had so decided.

The appellant instituted proceedings against the Municipal Councillors. There is no doubt that it was they who were the employers of the appellant even though the provisions of section 16 of the above-quoted Ordinance applied. In his action the appellant claimed certain declarations which included a declaration that the decision of the Establishment Committee of the Municipal Council was *ultra vires* and/or null and void and also included a declaration that the termination of his employment was wrongful and void and that he had the right to continue his employment with the respondents as from the 1st October, 1957. There was an alternative claim for damages for wrongful dismissal.

On behalf of the appellant it was argued at the trial that the letter of the 1st October, 1957 showed that it was the Establishment Committee of the Municipal Council that had purported to dismiss the appellant whereas in view of the provisions of section 16(5) of the Municipal Ordinance they had no power to do so: the result, it was argued, was that their act was *ultra vires* and a nullity, that such nullity could not be ratified by the President by his subsequent letter of the 28th October, and consequently that the appellant had continued to be employed on the permanent establishment of the Municipality and was entitled to a declaration to that effect.

In giving judgment dismissing the claim Ong J. said:—

"On the evidence it is clear that the matter of the unpaid cheques was brought immediately to the notice of the President, on whose instructions plaintiff was suspended on June 25. He was cognisant of the complaint when he presided at the Establishment Committee meeting which decided on the dismissal, and he again presided at the full Council Meeting approving the decision of the Committee. The minutes of these meetings showed that he and the Councillors present came to one and the same decision. I am therefore of opinion that, even if the letter of the Acting Municipal Treasurer dated October 1, 1957 could have been more appropriately worded in strict compliance with the provisions of section 16(5), no amount of hair-splitting can alter the fact that the President decided, as the other Councillors did, to dismiss the plaintiff. For this reason I hold that the purported dismissal in fact was a dismissal by the President with the concurrence and approval of the Municipal Councillors, although such approval was not necessary under section 16(5), as plaintiff's commencing salary was under $200 a month. No question of *ultra vires* therefore arises."

The learned Judge also held that section 16(5) of the Municipal Ordinance gave power to the President to remove at pleasure any employee whose commencing salary was under $200 per month.

The appellant appealed to the Court of Appeal. All the learned Judges in that Court agreed that the power of the President under section 16(5) of the Municipal Ordinance was a power to remove at pleasure and to do so without cause notice or hearing though it was a power to be exercised in the interests of good government in the Municipality. The view of the learned Chief Justice was that the power of dismissal had in fact been exercised by the President. The majority held however that the appellant had in fact been dismissed by the Council and not by the President with the result that there had been a wrongful dismissal which entitled the appellant to receive damages. Damages were awarded on the basis of three months' salary. In his judgment Hill J.A. said:—

"In my view the appellant should have succeeded in some measure in the lower Court as his dismissal was not in accordance with section 16(5).

I would allow the appeal by giving the appellant the first declaration he prays for that the decision of the Establishment Committee of the Municipal Council is *ultra vires* and/or null and void.

As the appellant had no vested right to his employment and as his services could have been legally terminated by the President at any time during the past two years or so, I consider that three months' pay and allowances would adequately compensate him and would so order."

Good J.A. in his judgment said:—

"In the present case, the President, on his own admission, undoubtedly considered himself bound by the decision of the Establishment Committee as confirmed by the Municipal Council. In effect, the President was acting under the directions of a majority of the Council, and the decision to remove the appellant was not his decision (even though it may have coincided with his opinion) but the decision of the Council. As such, it was *ultra vires* and accordingly the removal of the appellant constituted wrongful dismissal.

For these reasons I would allow the appeal.

I agree with Hill J.A. as to the quantum of damages: I would allow three months' salary and allowances at the rate applicable to the appellant in September, 1957. I would also award him the costs of this appeal and of the proceedings in the High Court."

In appealing to their Lordships' Board the main contention of the appellant was that inasmuch as his purported dismissal had been found to be *ultra vires* it should be held that his dismissal was null and void and that he was and still is employed by the respondents and that it should be so declared. It was said therefore that the question raised in the appeal related only to the form of remedy appropriate to the conclusion of the Court of Appeal against the validity of which there was no cross appeal. As an alternative it was contended that if (contrary to the appellant's submission) it were held that the appellant had been dismissed then the damages should be increased. On behalf of the respondents it was submitted that the President had in fact exercised his power of dismissal but furthermore it was submitted that, if that were not so, the employment of the appellant had nevertheless been terminated by his employers (the respondents) with the result that there had, *de facto*, been a dismissal, and that at its highest the claim of the appellant could only be for damages for wrongful dismissal. It was submitted that where a person is employed under a contract of service and where there is neither any kind of vested interest nor any special statutory status a repudiation of the contract or a wrongful termination of it by way of dismissal operates to put an end to the contract with the result that the remedy lies, and lies only, in a claim for damages.

For the purposes of this appeal it must be accepted that the dismissal of the appellant was irregular: the letter of the 1st October, 1957 shows that the dismissal was by the Council and was not the result of an exercise by the President of his power of dismissal. It is apparent however that the argument for the appellant rests very considerably upon a technicality. The President was a party to the decision of the Establishment Committee at their meeting on the 18th September. So also was he a party to the decision of the full Council at their meeting held on the 30th September at which he presided. The President did however in his evidence say that it was the Council's decision that the appellant be dismissed and that the matter had not rested with him but with the Establishment Committee and the full Council: he said that the usual procedure was that if he formed the opinion that someone should be dismissed the matter went before the Establishment Committee and that if his decision was not approved of by the Establishment Committee he would "waive" his decision. He added that in his capacity as President the only communication by him to the appellant was in his letter of the 28th October and he said: "Till that date I did not dismiss the plaintiff". It appears therefore both that the President would have been prepared either before or on the 30th September to remove the appellant from his office and also that he concurred in the decision of the Council to terminate the appellant's services. Accepting however the decision of the Court of Appeal, which, as has been pointed out, has not been the subject of any cross-appeal, the position on the 1st October was that the removal of the appellant was a removal by the Council and not by the President. The Council were his employers but having regard to the provisions of the Ordinance their termination of his service constituted wrongful dismissal. Their Lordships consider that it is beyond doubt that on the 1st October, 1957 there was *de facto* a dismissal of the appellant by his employers the respondents. On that date he was excluded from the Council's premises. Since then he has not done any work for the Council. In all these circumstances it seems to their Lordships that the appellant must be treated as having been wrongly dismissed on the 1st October, 1957 and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since the 1st October, 1957 he had continued to be and that he still continues to be in the employment of the respondents.

During the argument before their Lordships' Board a question was raised as to whether, notwithstanding the powers given to the President by section 16(5) of the Ordinance, the Council as employers and parties to the service contract had an independent right to determine it as for example by giving some reasonable period of notice. This point does not appear to have been raised at the trial or in the Court of Appeal and their Lordships do not consider that it should now be explored and they express no opinion in regard to it. A further question was raised as to whether on any view the President's letters of the 28th October, 1957 did not upon that date put an end to the contract. As this point does not appear to have been canvassed at the trial or in the Court of Appeal their Lordships express no opinion in regard to it.

In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration.

In the case of *Vine* v. *National Dock Labour Board* [1] Ormerod J. had in his discretion made such a declaration and the House of Lords, adopting the view expressed in his dissenting judgment in the Court of Appeal by Jenkins L.J., were of opinion that the declaration had been rightly made. In that case however the circumstances were very special. The plaintiff was and had been for some thirty years a dock labourer. As a result of legislation designed to remove the objection of those so employed that theirs was a purely casual occupation so that their right to work depended upon the accident of its availability at the docks, all dock labourers were registered as employed by the National Dock Labour Board — though they never in fact worked for the Board. In the circumstances of that case it was held to be right that the plaintiff — whose dismissal was shown to have been without proper authority — should have the benefit of a declaration that he was still in the employment of the National Board, since, unless he was, he would be disabled from carrying on at all his chosen trade of a dock labourer.

Even if, as Mr. Foot submitted, the terms of the appellant's service could by reason of the Ordinance be regarded as "statutory", that formula does not, in their Lordships' opinion make the present case at all analogous to *Vine's* case. It could not be suggested that in the absence of the declaration which is sought the appellant would be disabled from working as a clerk or clerical assistant. A declaration as sought in the present case would inevitably amount to or involve specific performance of the appellant's contract of service — if it were practically effective. But, having regard to the President's powers under section 16(5) of the Ordinance, it is clear (as observed by the majority in the Court of Appeal) that the President could, notwithstanding the declaration, forthwith terminate the contract and could at any time in the past have done so. It is indeed not entirely clear what, in the circumstances and having regard to

the lapse of time, the terms (including remuneration) of the appellant's service would have now to be taken to be, if the declaration were made; but the practical effect would be to give to the appellant a monetary claim far in excess of the damages awarded by the Court of Appeal and far in excess of any measure of damages to which the appellant appears to the Board to be entitled as flowing from a wrongful dismissal.

In his judgment in the Court of Appeal in *Vine's* case Jenkins L.J. (at p. 674) said:

"But in the ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract, and the contract having been wrongfully put an end to a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more."

In his speech in that case in the House of Lords Lord Kilmuir L.C. at page 500 said:—

"It follows from the fact that the plaintiff's dismissal was invalid that his name was never validly removed from the register and he continued in the employ of the National Board. This is an entirely different situation from the ordinary master and servant case; there, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is therefore right that, with the background of this scheme, the court should declare his rights."

In their Lordships' view the circumstances of the present case are not comparable with those in *Vine's* case and are not such as to make it appropriate to give a declaratory judgment in the manner contended for on behalf of the appellant. The appellant's employment must be treated as having in fact come to an end on the 1st October, 1957 and the appellant's remedy lay in a claim for damages. Their Lordships express no view as to the amount of the damages awarded beyond saying that no ground for their increase has been shown.

Their Lordships will report to the Head of the Federation that in their opinion the appeal should be dismissed and the appellant should pay the costs of the appeal before their Lordships' Board.

Appeal dismissed.

Solicitors: *Graham Page & Co.; C. Grobel Son & Co.*

CHENG EE MUN v. LOOK CHUN HENG & ANOR.

[C. A. (Rose C.J., Buttrose and Wee Chong Jin JJ.) October 3, 1962]

[Singapore — Civil Appeal No. 11 of 1962]

Chinese Law and Custom — Married woman ceasing to live with husband — Marriage not dissolved — Second wedding ceremony undergone by married woman — Whether valid — Legitimacy of issue of purported second marriage — "Issue" — Meaning of.

The appellant's mother, L.M.W., married one B in or about 1917 at a marriage ceremony according to Chinese custom. Within 2 months after the marriage she left her husband and went back to live with her father, L.K.Y., the testator, but she continued to visit B from time to time until 1943 or 1944. There never was any divorce or agreement to a separation. At some time before 1933, she went through a form of wedding ceremony with one C.Y.C., and as a result of this union the appellant was born. The appellant now claimed a share under the testator's will on the ground that he was the lawful son of L.M.W., or alternatively that he fell within the meaning of the expression "issue" in clause 13 of the will.

Held: (1) since the marriage between the appellant's mother and B had not been dissolved at the time when the purported second marriage took place with C.Y.C. the second marriage ceremony did not result in a valid marriage between them and therefore the plaintiff was not a lawful issue of his mother;

(2) there was no evidence that the testator intended the expression "issue" in clause 13 of his will to mean any issue other than a legitimate child.

COURT OF APPEAL.

L. A. J. Smith for the appellant.

M. Karthigesu for the respondents.

Cur. Adv. Vult.

Wee Chong Jin J. (with whom **Rose C.J.** and **Buttrose J.** agreed): This appeal arises out of a claim by the appellant to a share in the estate of Look Yan Kit deceased (hereinafter referred to as "the testator") under the provisions of the will of the testator. The claim is based on two grounds, namely, that he was the lawful son of one Look Moon Wai, a daughter of the testator or alternatively that he fell within the meaning of the expression "issue" in clause 13 of the Will of the testator so that in the events that have happened he was entitled to take the share of his deceased mother notwithstanding the fact that he was not a legitimate son of Look Moon Wai.

The facts as found by the learned trial Judge were as follows: The plaintiff's mother married one Boey Peng Khwai in or about 1917 at a marriage ceremony held in accordance with